80-890

No.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner,

v.

NATIONAL FORGE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

In a §301 action brought by employees under *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and filed subsequent to an arbitration award, is the applicable statute of limitations that governing contract actions or that governing suits to vacate arbitration awards?

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania on the question presented is not officially reported, but is reprinted as App. A to this petition. The opinion of the Third Circuit Court of Appeals, reversing the district court on the question presented, is not officially reported but is reprinted as App. B to this petition.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was issued on September 10, 1980 (App. C). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Pennsylvania statute of limitations for actions on a written contract, 42 Pa. Cons. St. Ann. §5527 (Purdon), provides in pertinent part as follows:

> **§5527. Six year limitation**
>
> The following actions and proceedings must be commenced within six years:
>
> . . .
>
> (2) An action upon a contract, obligation or liability founded upon a bond, note or other instrument in writing. . . .

(42 Pa. Cons. St. Ann. §5527 was enacted on July 9, 1976 and became effective on June 27, 1978. Predecessor statutes dating back to 1713 also provided a year-six statute of limitations for actions on a written contract.)

The Pennsylvania arbitration statute, 5 Pa. Con. St. Ann. §173 (Purdon), provides:

> **§ 173. Notice of motions, service, stay of proceedings**
>
> Notice of a motion to vacate, modify, or correct an award shall be filed in the prothonotary's office of the court in which the application is made, and to be served

upon the adverse party, or his attorney, within three months after the award is filed, or delivered, as prescribed by law for service of notice of a motion in an action. The court may in all proper cases, upon the filing of the motion, grant a stay of proceedings pending the determination of the motion. 1927, April 25, P.L. 381, No. 248, § 13.

STATEMENT OF THE CASE

Petitioner was discharged on March 16, 1976. Arbitration proceedings were had, and an adverse award issued on August 3, 1976. The instant action was filed March 16, 1978, under Section 301 of the Labor Management Relations Act as amended, 29 U.S.C. §185.[1]

Defendant moved to dismiss the §301 claim on the ground that the 90 day statute of limitations for an action to vacate an arbitration award applied.

On May 22, 1978, the district court denied the motion to dismiss. Citing *Hines* v. *Anchor Motor Freight, Inc., supra,* and *Fannie* v. *Chamberlain Mfg. Corp.*, 455 F.Supp. 65 (W.D. Pa. 1977), the court held that the applicable statute was Pennsylvania's 6 year statute of limitations for actions on a written contract. See App. A.

Subsequently, defendant moved for summary judgment, and the district court granted the motion. Petitioner appealed this decision to the court of appeals, and defendant cross-appealed the district court's previous decision on the statute of limitations issue.

---

[1] Count II of the complaint alleged that plaintiff's discharge violated 42 U.S.C. §1981, and is not relevant to this appeal.

On September 10, 1980, the Third Circuit Court of Appeals affirmed the district court's grant of summary judgment on the §301 claim on statute of limitations grounds. See App. B and C.

This appeal followed.

REASONS FOR GRANTING THE WRIT

1. Two federal courts of appeals have rendered decisions in conflict with the decision of the Third Circuit Court of Appeals on the question presented. In *Smart* v. *Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir. 1978), *cert. den.*, 440 U.S. 958 (1979), the Sixth Circuit Court of Appeals held as follows:

> Ellis argued below that the wrongful discharge claim was time barred. The argument was based on the contention that Appellant is actually seeking to set aside an arbitration award, and that the statute of limitations applicable to a claim for such relief is either three months under the United States Arbitration Act, 9 U S.C. § 12, or twenty days under Michigan General Court Rules 769 dealing with arbitrations. 409 F.Supp. at 131. The District Court found it unnecessary to reach the issue, but Ellis presses it again before this Court. The simplest answer to Ellis' argument is that Appellant's action for wrongful discharge is not in the nature of a motion to vacate or modify an arbitration award, at least to the extent that it states a claim under § 301. Although the effect of a judgment for Appellant would be to nullify the arbitral decision, the § 301 action is "independent" of the grievance process. *See Hines* v. *Anchor Motor Freight,* 424 U.S. at 554, 96 S.Ct. at 1048, 47 L.Ed.2d at 231. Indeed, such a claim can be brought even before an arbitral decision where a union refuses in bad faith to process a grievance. *Vaca* v. *Sipes,* 386 U.S. 171, 186, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The fact that the plaintiff must show a flaw in the grievance process as a prerequisite to recovery does not alter the basic focus of the § 301 claim on the propriety of the discharge itself. Since Michigan applies a three year limitation period to wrongful discharge claims such as the one here raised (*see Glowacki, supra*), the action was not time-barred.

580 F.2d at 219 (footnotes omitted).

In *Mitchell* v. *United Parcel Service, Inc.*, 624 F.2d 394 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3270 (Oct. 14, 1980) (No. 80-169, 1980 Term), the Second Circuit Court of Appeals came to the same conclusion as the Sixth Circuit. The court offered the following reasons for its holding:

The effect of applying the statute of limitations for suits to vacate arbitration awards to a §301 action filed subsequent to an arbitration proceeding would be to create one limitations period for §301 actions filed prior to an arbitration award, and another limitations period for §301 actions filed after an arbitration award. "We do not believe that such a fractionalized approach to §301 wrongful discharge actions is warranted." 624 F.2d at 397.

To limit employee §301 actions following an arbitration award to a 90 day period following the adverse arbitral decision would severely restrict the Supreme Court's decision in *Hines* v. *Anchor Motor Freight, Inc., supra. Id.*

§301 actions cannot be equated with direct attacks on arbitration awards, nor can they be viewed as the same threat to the finality of arbitration awards. Post-arbitral actions under §301 require a plaintiff to carry a heavier burden than an action challenging an arbitration award. "There is no need to increase this burden by requiring the employee to commence the action in an unduly short period of time after his discharge." *Id.*

Far from suggesting that a 90 day period was needed to reach the goal of relatively rapid disposition of disputes, the Supreme Court in *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 707 n. 9 (1966), indicated that "unusually short" limitation periods such as a 60 day New Mexico statute should not be applied to §301 actions. 624 F.2d at 398.

Regardless of the merits of the arguments of the Sixth Circuit in *Smart* v. *Ellis, supra,* of the Second Circuit in *Mitchell* v. *United Parcel, supra,* and of petitioner herein, the existing con-

flict among the circuits creates confusion and uncertainty for aggrieved workers, for unions, for employers, and for their respective attorneys.

2. Had the holding of the Third Circuit Court of Appeals in the instant case been law at the time plaintiffs in *Hines* v. *Anchor Motor Freight, Inc., supra,* filed their complaint, the case would have had to be dismissed as out of time and the injustice done to the workers in that situation would never have been corrected. In *Hines,* arbitration was had in July 1967. 424 U.S. at 557. A year later a motel clerk admitted that he rather than the discharged employees had been guilty of dishonesty. 506 F.2d at 1156, quoted 424 U.S. at 559 n. 4. In June 1969, almost two years after the arbitration award, suit was filed in federal district court. 424 U.S. at 558. Although the statute of limitations does not appear to have been pleaded as an affirmative defense in *Hines,* this Court impliedly concluded that a §301 suit filed two years subsequent to an arbitration proceeding was consistent with national labor policy.

3. In *United Parcel Service* v. *Mitchell,* No. 80-169, this Court granted a petition for certiorari to consider the same question as that presented here. Accordingly, the Court should either grant this petition for consideration together with No. 80-169, or hold this petition for disposition in light of the Court's decision in that case.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to decide the important question presented herein.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES J. LIOTTA
v.
NATIONAL FORGE CO. } Civil Action No. 78-25 Erie

Dated: May 22, 1978.

Memorandum Opinion

Plaintiff's complaint alleges two causes of action: first, under section 301 of the Labor Management Relations Act (29 USCA 185) claiming that the union breached its duty of fair representation in processing grievances of the plaintiff. The second count charges a violation of the Civil Rights Act 42 USCA 1981. Defendant has moved to dismiss.

In approaching a motion to dismiss we must always bear in mind what has been said by the Supreme Court in many cases most recently in Scheuer v. Rhodes, 416 US 232, 40 L Ed 90, 94 S Ct 1683 (1974) where the court quotes Conley v. Gibson, 355 US 41 (1957) as holding "the accepted rule (is) that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".

Defendant claims that the plaintiff's first cause of action is barred by the Pennsylvania Statute of Limitations providing for an appeal within three months as provided by the Pennsylvania Arbitration Act 5 PS 173 and the U.S. Arbitration Act 9 USC 1, *et seq.*

There are it is true certain decisions prior to Hines v. Anchor Motor Freight Inc. 424 US 554, 96 S Ct 1048, 47 L Ed 2d 231

(1976) to the effect that in a fair representation case the state statute of limitations of 3 months for an appeal from an award of arbitrator should apply. However, since the case of Hines it has been clearly held as noted by Judge Teitelbaum of this court in Fannie v. Chamberlain Mfg. Corp., 455 FS 65 (W.D.Pa. 1977) that "an arbitration decision is not binding on employees where the union has breached its duty of fair representation." In other words the fair representation action is an entirely separate action from the arbitration of the discharge or discipline.

Judge Teitelbaum further went on the hold as we do that the Pennsylvania 6 year contract statute of limitations applies to a breach of the duty of fair representation. Therefore, count 1 must stand.

With respect to count 2 under 1981, there is no question as alleged in the complaint that plaintiff is a white. He alleged that he was discriminated against in his discharge for espousing the cause of blacks at National Forge Company. No state action is involved, however, there is no requirement for such under 1981. While at first blush 1981 would seem to apply only to minority groups such as blacks who are discriminated against, in view of the language that all persons shall have the same right to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, nevertheless, it is obviously clear that if a white working for a negro enterprise is discriminated against he has standing to sue under 1981.

It has further been held in Sullivan v. Little Hunting Park, 396 US 229, 24 L Ed 2d 386, 90 S Ct 400 (1969) that a white person who has been punished for trying to vindicate the rights of non-white minorities has standing to sue under 1981 and 1982. This is the allegation contained in plaintiff's complaint.

To the same effect is the holding of the Second Circuit affirming a suit from the Western District of New York in DeMatteis

v. Eastman Kodak Co., 511 F 2d 306 (1974) wherein the court followed the Sullivan case and held that a claim that Eastman Kodak forced a man into retirement solely because he had sold his house to a black person and thereby precipitated his retirement prematurely stated a cause of action under 1981.

With respect to the statute of limitations under 1981 it is clear that the Pennsylvania 6 year statute of limitations also applies to this cause of action. See Wilson v. Sharon Steel Corp., 549 F 2d 276 (3d cir 1977). and subsequent decision of Judge McCune.

For the above reasons, we will deny the motion to dismiss.

/s/ William Knox
U.S. District Judge

Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES J. LIOTTA
v.
NATIONAL FORGE CO. } Civil Action No. 78-25 Erie

Order

AND NOW, to wit, May 22, 1978, for reasons set forth in the accompanying memorandum,

IT IS ORDERED that defendant's motion to dismiss be and the same hereby is denied.

/s/ Illegible
U.S. District Judge

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2124 and 79-2252

JAMES J. LIOTTA, an individual,
Appellant in No. 79-2124

v.

NATIONAL FORGE COMPANY,
Appellant in No. 79-2252

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civ. No. 78-0025)

Argued: July 8, 1980
Before: SEITZ, *Chief Judge,* VAN DUSEN,
and HIGGINBOTHAM, *Circuit Judges*
(Filed: September 10, 1980)

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Opinion of the Court

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

The appellant, James J. Liotta, formerly President of the Local 1573 of the United Steelworkers of America. AFL-CIO (the Union), was discharged from his employment with the National Forge Company (the Company) on March 16, 1976. This followed his participation in a work stoppage at the Company's Erie, Pennsylvania plant which began on March 3, 1976 and ended on March 11, 1976. Liotta filed a grievance pursuant to the terms of the collective bargaining agreement then in effect. His grievance was denied by an arbitrator on August 3, 1976. On March 16, 1978, he filed this action alleging first that his discharge violated the collective bargaining agreement in violation of Section 301 of the National Labor Relations Act, 29 U.S.C. §185 and that the arbitrator's contrary decision resulted from the Union's breach of its duty of fair representation. Second, he claimed that the Company discharged him because of his espousal of the rights of the Company's black employees, discriminating against him in violation of 42 U.S.C. §1981. Liotta appeals from the entry of summary judgment for the Company. The Company cross appeals on the ground that Liotta's complaint is barred by the applicable statutes of limitations. We conclude that his claim under Section 301 is time barred,

that his claim under 42 U.S.C. §1981 is not time barred, and that summary judgment was inappropriate on his Section 1981 claim because of the existence of material issues of fact. We will therefore affirm in part and reverse in part.

I.

The first question we must answer is whether Liotta's Section 301[1] cause of action was untimely and therefore whether the Company's motion to dismiss should have been granted. The Company's motion was based on the ground that Liotta's claims were barred by the three-month statute of limitations of the Pennsylvania General Arbitration Act, Pa. Stat. Ann. tit. 5 §173 (Purdon 1963). The district court held that the six-year limitations period for actions upon a contract applied.

We believe the district court erred. In *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966), the Supreme Court held that "the timeliness of a §301 suit. . .is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Courts within this circuit have consistently applied the three-month limitations period to suits seeking to vacate an arbitrator's award. *Cole* v. *United Steelworkers,* 441 F.Supp. 1346, 1351 (M.D. Pa. 1977), *aff'd mem.*, 588 F.2d 819 (3d Cir. 1978); *Siskey* v. *General Teamsters, Chauffeurs,* 419 F. Supp. 48, 50 (W.D. Pa. 1976); *UMWA* v. *Jones & Laughlin Steel Corp.*, 378 F.Supp. 1206,

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[1] Section 301(a) provides, in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185.

1211-12 (W.D. Pa. 1974); *International Brotherhood* v. *Motor Freight Express,* 356 F.Supp. 724, 726 (W.D. Pa. 1973).

It is important to identify the nature of Liotta's first cause of action since the three-month statute of limitations of Pennsylvania's General Arbitration Act would apply only where one seeks to vacate an arbitrator's award. A fair reading of Liotta's complaint demonstrates that he seeks to vacate the arbitrator's decision. Paragraph 22 of his complaint alleges that he "was unfairly represented before, during and after Arbitration by the" attorney for the International Union. App., at 10. Paragraph 23 alleges that the "Arbitration itself was improper and unfair." App., at 12. Indeed, he sought to litigate before the district court the same claim he presented for arbitration, that of improper discharge.

Moreover, the fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him.

The result we reach comports with the general federal policy favoring arbitration as a means of resolving labor disputes, *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960), and with the federal labor policy that favors the application of shorter limitations period. In *International Union, UAW* v. *Hoosier Cardinal Corp.,* 383 U.S. 696, 707 (1966), the Supreme Court stated:

> [R]elatively rapid disposition of labor disputes is a goal of federal labor law. Since state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to §301 actions comports with that goal.

Courts in other jurisdictions have consistently applied the statute of limitations pertaining to appeals from arbitration awards rather than the longer statute of limitations governing actions bottomed on written contracts when such actions seek to vacate arbitration awards. *E.g. Barbarino v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976); *DeLorio v. United Parcel Service, Inc.*, 401 F.Supp. 408 (D.Mass. 1975); *Hill v. Aro Corp.*, 275 F.Supp. 482 (N.D. Ohio 1967); *contra, Smart v. Ellis Trucking Co.*, 580 F.2d 215 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

We therefore conclude that Liotta's first cause of action seeking review and vacation of the arbitration award was untimely and that the Company's motion to dismiss should have been granted.

II.

The next issue we must consider concerns Liotta's claim under 42 U.S.C. §1981.[2] As a threshold matter, however, we must first address the Company's assertion that this claim is also time barred.

As with Section 301, 42 U.S.C. §1981 provides no explicit period of limitations and courts are bound to apply the most appropriate limitations period provided by state law. *Johnson v.*

---

[2]Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1981

Railway Express Agency, 421 U.S. 454, 462 (1975). This court in *Davis v. U.S. Steel Supply,* 581 F.2d 335 (3d Cir. 1978), held that the six-year statute of limitations for contracts under Pennsylvania law applied to a Section 1981 claim of unlawful discharge. We therefore conclude that Liotta's second cause of action under 42 U.S.C. §1981 is not barred as untimely.

With regard to the merits of Liotta's Section 1981 claim, the district court granted the Company's motion for summary judgment for the following reasons:

> The only evidence which plaintiff has submitted to the court in support of his allegations is a letter from Bobby Kaigler, Compliance Officer of the Erie Human Relations Commission (EHRC), which states that plaintiff testified before the EHRC on behalf of black complainants who were discharged by defendant and that "It is the belief of this office that Mr. James Liotta was terminated from his job because of his contant fight for 'Equal Rights' of all men." (Plaintiff's summary judgment exhibit 7n). This letter is not an affidavit and it has not been notarized. Consequently, the conclusory "belief" expressed in the letter, which is not based on personal knowledge, is insufficient to create or support an inference that racial discrimination played any part in plaintiff's discharge. Olympic Junior, Inc. v. David Crystal, Inc., 463 F. 2d 1141 (3rd Cir. 1972). No genuine issue of material fact supporting plaintiff's claim has been presented by plaintiff's evidence.

Liotta v. National Forge Company, Civ. No. 78-0025 (W.D. Pa. July 11, 1979) at 11-12, *reprinted in* App., at 45-46.

Liotta claims, however, that he also submitted to the district court the charge he filed with the Equal Employment Opportunity Commission (EEOC) listing a number of instances where he encouraged black employees to file charges against the Company. The affidavit which was attached to his EEOC charge and which was also before the court, alleged that the Company

discharged him in retaliation for his activities in support of the rights of black employees. Specifically, he averred:

> I have consistently attempted to eliminate discrimination as practiced by Respondent Employer against Black members of Local 1573 of the United Steelworkers of America. The Respondent Company systematically has violated the non-discrimination clause known as Appendix I of the collective bargaining agreement between National Forge and Local 1573. Some of the ways I opposed discrimination, included the following: I encouraged a large number of Union members to report their allegations of discrimination to the Erie Human Relations Commission; since I began duties as President of Local 1573 in October, 1975. I encouraged a number of Black workers to file charges with such Commission, and advised them of my knowledge of the best way to remedy the specific acts they were complaining of. I also fought the company on a day-to-day basis in trying to make conditions fair for all workers. I helped to take a case to arbitration on behalf of Black worker, Dennis Toliver. Shortly before my discharge, I had notified the Respondent Employer that two other grievances of Black workers (the grievances of Troy Johnson and Aaron Clanton) regarding discrimination claims, were going to be fought through the arbitration phase of the grievance procedure. I have appeared at a number of hearings of the Erie Human Relations Commission regarding the claims of discrimination by Black workers. Respondent Company has a history of unfair discharges of Black workers, and I have been active in opposing such practices.

App., at 51-52.

Our review of this document leads us to conclude that genuine issues of material fact are raised by Liotta's specific allegations. These are matters that clearly are in dispute and

they are material because if proven they could support a finding that the Company's actions against Liotta were motivated by a racial animus.

In addition, contrary to the Company's argument, it is clear that Liotta has set forth specific facts, not merely conclusory allegations of wrongdoing by the Company. Moreover, the Company has not denied that these documents were in fact before the district court as part of the record. Instead, the Company challenges the EEOC affidavit as not complying with the technical requirements of Fed. R. Civ. P. 56(e) in that it was not alleged to be based on personal knowledge. That this argument is specious is evident from a reading both of the affidavit and of Rule 56(e). First, Rule 56(e) does not require that the affiant state affirmatively that the averments are based on personal knowledge. Rather, the Rule provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

A reading of Liotta's EEOC affidavit shows that it was "made on personal knowledge," "set[s] forth . . . facts as would be admissible in evidence," and "show[s] affirmatively that [he] is competent to testify to matters stated therein."

The fact that these allegations may not be proved at trial if the jury chooses to believe the Company is irrelevant at this stage. What is relevant is that the parties have focused on specific, pertinent issues of fact and disagree strenuously about them. We therefore conclude that summary judgment was inappropriate and that the case should be remanded on the Section 1981 claim. *See Bryson v. Brand Insulations, Inc.*, No. 79-2042, slip op. at 7 (3d Cir. Apr. 30, 1980).

III.

Accordingly, we will affirm the district court's judgment as to Count I of the appellant's complaint. We will reverse the district court's grant of summary judgment on the appellant's Section 1981 claim and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2124 and 79-2252

James J. Liotta, an individual,
Appellant in No. 79-2124

v.

National Forge Company,
Appellant in No. 79-2252

(D.C. Civil No. 78-0025 Erie)

On Appeal From The United States District Court
For The Western District Of Pennsylvania

Present: SEITZ, Chief Judge and VAN DUSEN
and HIGGINBOTHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pensylvania and was argued by counsel on July 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 11, 1979, be, and the same is hereby affirmed as to the district court's grant of summary judgment on Count I of the Appellant's claim under section 301 of the National labor Relations Act, 29 U.S.C. § 185; the district court's grant of summary judgment on Count II of the Appellant's claim under 42 U.S.C. § 1981 be and the same is hereby reversed, and the cause is remanded for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ Illegible

Clerk

September 10, 1980

JAN 3 1981
CLERK

No. 80-890 OCTOBER TERM, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner

v.

NATIONAL FORGE COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in applying the Pennsylvania statute of limitations governing suits to vacate an arbitration award to Petitioner's post-arbitration Section 301 action seeking from his employer alone the identical remedy denied in final and binding arbitration?

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II. STATEMENT OF THE CASE

Petitioner was discharged from his employment with Respondent on March 16, 1976. The collective bargaining agreement between Petitioner's Union and Respondent provided for final and binding arbitration of such a discharge. The arbitration provisions were pursued and an arbitration award, dated August 3, 1976, sustained Petitioner's discharge.

On March 16, 1978, Petitioner filed the instant action pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185. The Respondent moved to dismiss the Section 301 claim on the ground that it was time barred. On May 22, 1978, the District Court denied the Respondent's Motion to Dismiss. Subsequently, the District Court granted Respondent's Motion for Summary Judgment on grounds unrelated to the Motion to Dismiss.

Petitioner appealed the grant of summary judgment to the Court of Appeals and Respondent cross-appealed the District Court's denial of its Motion to Dismiss.

On September 10, 1980, the Court of Appeals affirmed the District Court's entry of judgment for Respondent but based its decision on the ground that Petitioner's Section 301 action was time barred and that Respondent's Motion to Dismiss should have been granted by the District Court.

Petitioner seeks a Writ of Certiorari to review the Circuit Court's ruling on Respondent's original Motion to Dismiss.

III. ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Petitioner's appeal to this Court's traditional concern with conflicting decisions in the various federal circuits asserts that the decision of the Third Circuit is in conflict with decisions of the Second and Sixth Circuits on the question presented. A comparison of the relevant decisions reveals a fundamental difference between the instant case and those decided by the Second and Sixth Circuits - a difference which was expressly recognized by the Third Circuit in its opinion.

The Third Circuit, in accordance with this Court's directive in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107 (1966), was required to select the most appropriate Pennsylvania limitations period for a Section 301 action where the action is against *an employer only* seeking to relitigate a contractual question already resolved by final and binding arbitration. The action was not against the Union and sought no remedy from the Union for a breach of the duty of fair representation. The Third Circuit properly characterized "the nature" of Petitioner's action as an attempt "to vacate the arbitrator's decision" and "to litigate before the District Court the same claim he presented to arbitration. . . ." Accordingly, the Third Circuit determined that the state limitations period which was most consistent with both the nature of Petitioner's action and the larger goals of federal labor policy was the three month limitations period of Section 13 of the Pennsylvania General Arbitration Act, 5 Pa. C.S. § 173. This decision is undeniably consistent with this Court's oft-repeated references to the federal statutory policy favoring rapid and final resolution of labor disputes in general and labor arbitration specifically. *See, e.g., United Steelworkers of America v. Enterprise Corp.*, 363 U.S. 593, 599, 80 S. Ct. 1358 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566, 80 S. Ct. 1343 (1960); and *Humphrey v. Moore*, 375 U.S. 335, 351, 84 S. Ct. 363 (1963).

The Third Circuit expressly emphasized the fact that Petitioner's action was against the Respondent employer *only*, and not against

the union. By contrast, the plaintiffs in both *Mitchell v. United Parcel Service*, 624 F. 2d 394 (2nd Cir., 1980), *cert. granted*, 49 U.S.L.W. 3270 (No. 80-169, 1980 Term) and *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir., 1978), *cert. den.*, 440 U.S. 958 (1979), relied upon by Petitioner as being "in conflict" with the instant case, had elected to pursue relief both from their former employers (on the basis of wrongful discharge) and from their unions (on the basis of an alleged breach of duty of fair representation). This distinction from the instant case is fundamental to the proper characterization of Petitioner's Section 301 claim. An action against the employer alone is a clear and unequivocal attempt to vacate the arbitration award and relitigate the dispute in another effort to achieve the same result sought from the arbitrator - that Petitioner be made whole by his employer for its alleged breach of the collective bargaining agreement. By contrast, the plaintiffs in *Mitchell* and *Smart* sought relief from their unions in independent counts alleging a breach of the union's statutory duty and a conspiracy between the union and the employer.

An appreciation of this distinction makes it clear that the asserted conflict among the circuits is, in fact, illusory. The decision in the present case is unquestionably correct and no issue worthy of this Court's attention is presented.

2. This Court's decision in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107 (1966), conclusively rejected an argument that a uniform federal limitations period be established for Section 301 actions which allege that the arbitral process has malfunctioned. Indeed, this Court characterized that argument as a call for a "drastic sort of judicial legislation . . ." 383 U.S. at 703, 86 S. Ct. at 1111. The *Hoosier Cardinal* decision expressly sanctioned a potential lack of uniformity not only among the various circuits, but, indeed, among the various states within each circuit as the federal courts considered the appropriateness of various limitations provisions in various procedural and factual circumstances. The rationale in *Hoosier Cardinal* was sound and no reason has been advanced by Petitioner for re-examining that decision. The "conflict" relied upon by Petitioner is nothing more than the expected and desireable result of the implementation of this Court's decision in *Hoosier Cardinal*.

3. The fundamental distinction of this case from the circumstances presented by *Mitchell, supra,* makes it clear that the grant of a Petition for Writ of Certiorari in *Mitchell* is not supportive of the instant Petition.

4. Petitioner also urges grant of the Writ on the ground that this Court, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1966), somehow "impliedly concluded that a Section 301 suit filed two years subsequent to an arbitration proceeding was consistent with national labor policy." (Petition at p. 7.) The essence of Petitioner's argument is that application of a three month limitations period in *Hines* would have rendered that action untimely and, therefore, hearing and acting favorably on the *Hines* appeal was a prospective disapproval of the Third Circuit's decision in the instant appeal. Petitioner's argument in this regard is specious, for several reasons.

First, as is conceded in the Petition, the defendants in *Hines* never pleaded the statute of limitations as an affirmative defense as required by Fed. R.C.P. 8 (c). The timeliness issue was thus never raised by the defendants in *Hines* and was never properly before any of the *Hines* courts, including this Court. *Hines* could not have spoken to this question in any respect.

Second, even if we accept the argument that *Hines* constitutes an "implied holding" that a two year period of limitation is "consistent" with federal labor policy, such a conclusion is plainly immaterial in this case. The Circuit Court was constrained to select the *most appropriate Pennsylvania* period of limitations. Neither party asserts a two year period as one of the choices. Certainly, any of a relatively broad range of different state limitations periods might be inoffensive in terms of federal labor policy. But in this case, the only arguably appropriate periods are three months and six years.

The three month period is clearly the most appropriate one to apply to the issue as it was properly characterized by the Third Circuit. The alternative choice proposed by Petitioner is not only inappropriate but inconsistent with federal labor policy.

IV. CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner/Cross-Respondent

v.

NATIONAL FORGE COMPANY
Respondent/Cross-Petitioner

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is a defendant entitled to summary judgment where plaintiff has responded by affidavit setting forth specific facts showing that there is a genuine issue for trial?

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ARGUMENT IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI

Federal Rule 56(e) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The decision of the Third Circuit Court of Appeals (reproduced in Cross-Respondent's Petition for Writ of Certiorari, A-5 et seq.) makes clear that the Court relied, not on an EEOC "charge," but on an affidavit attached to the charge. A-10. The affidavit itself is set forth in pertinent part at A-11. Reviewing Cross-Respondent's affidavit the Third Circuit Court of Appeals found that "contrary to the Company's argument, it is clear that Liotta has set forth specific facts, not merely conclusory allegations. . . ." A-12. Accordingly the Court held that Cross-Respondent had

met his burden under Rule 56(e).

Cross-Petitioner's authorities do no more than reiterate the requirements of Rule 56(e). This Court's decision in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) simply states at 289 that "a party cannot rest on the allegations contained in his complaint." The cited Notes to Rule 56, presumably the Notes of 1963 to the amendment of Rule 56(e), repeat that a party cannot rest on his pleadings. 6 MOORE'S FEDERAL PRACTICE AND PROCEDURE (1976) 56-21 and 22. In United States ex rel. Kolton v. Halperin, 260 F.2d 590 (3d Cir. 1958), the Court at 591 found the affidavit of a plaintiff sufficient and rejected an affidavit by defendant's counsel.

CONCLUSION

For the foregoing reasons the Cross-Petition should be denied.

Respectfully submitted,

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No. 80-890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner,

v.

NATIONAL FORGE COMPANY,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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II. REPLY TO ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's principal argument for granting the writ is that two federal courts of appeal have rendered decisions in conflict with the decision of the Third Circuit Court of Appeals on the question presented. Petition at 5-6, citing Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), cert. den., 440 U.S. 958 (1979), and Mitchell v. United Parcel Service, Inc., 624 F.2d 394 (2d Cir. 1980), cert. granted, 49 U.S.L.W. 3270 (Oct. 14, 1980) (No. 80-169, 1980 Term).

Respondent's principal argument in opposition to granting the writ, first raised in the brief in opposition, is that there is a "fundamental difference" between the instant case and those decided by the Second and Sixth Circuits. The alleged difference is that this action is against an employer only, whereas in Smart, supra, and Mitchell, supra, plaintiffs had elected to sue both former employer and union. Brief in Opposition at 3-4.

Respondent's argument should be rejected for the following independently-sufficient reasons.

1. Respondent has misread Smart, supra. Plaintiff in Smart filed his original complaint against the employer only. Later, he amended his complaint to add counts charging his local union with breach of the duty of fair representation and alleging a conspiracy between the employer and the union. 580 F.2d at 217.

The District Court dismissed the amended complaint. Counts II and III were dismissed on the ground that they were time-barred. The Court of Appeals affirmed this portion of the decision below. Id. at 217-18.

The Court then turned to the District Court's dismissal of Count I, the breach of contract action against the employer only. Even though the union was not a defendant the Court of Appeals held that the action was not in the nature of a motion to vacate or modify an arbitration award, hence that the statutes of limi-

tation in the federal arbitration statute and in the state rules of court dealing with arbitration should not be applied. 580 F.2d at 219.

This decision is directly in conflict with the decision of the Third Circuit Court of Appeals in the instant case. The Third Circuit Court of Appeals itself characterized the decision in Smart, supra, as "contra" its decision here. Petition at A-9.

2. There is reason to doubt that Respondent has accurately characterized the basis of the Third Circuit Court of Appeals' decision. The only reference in the decision to the fact that plaintiff here sued the employer only occurs in a paragraph which begins "Moreover." Petition at A-8. The cases cited by the Third Circuit Court of Appeals in support of its decision are cases in which unions as well as employers were defendants. Petition at A-8 and 9. The Third Circuit appears to have announced a rule which it would apply to cases in which an employee

sued both an employer and a union, as well as to cases in which an employee sued an employer only, which rule is accordingly in conflict not only with the decision in Smart, supra, but also with the decision in Mitchell, supra, where both employer and union were defendants.

3. Assuming for the sake of argument that Respondent has characterized the basis of the Third Circuit Court of Appeals' decision correctly, this Court has additional reasons for granting the writ. This Court ha made it clear that an employee plaintiff in a §301 case must allege that the union has unfairly represented him or her, but may or may not elect to make the union a defendant "to facilitate his case." Vaca v. Sipes, 386 U.S. 171, 186-87 (1967). The Third Circuit as interpreted by Respondent would draw fundamental jurisdictional consequences from a decision this Court, in Vaca, supra, characterized as discretionary. Furthermore, if the decision of the Third Circuit Court of Appeals in this case is understood

to mean that different limitation periods should apply to employers and unions in §301 cases, that holding would directly conflict with contrary decisions of the Second and Eighth Circuits. Abrams v. Carrier Corp., 434 F.2d 1234, 1252-53 (2d Cir. 1970), cert. den., 401 U.S. 1009 (1971). Butler v. Local Union 823, 514 F.2d 442, 447-48 (8th Cir. 1975), cert. den., 423 U.S. 924 (1975).

4. It appears to be Respondent's view that the decision of the Third Circuit Court of Appeals means that different limitation periods should apply not only depending on the state in which the action is brought, but depending also on whether the action occurs before or after arbitration, and whether the union is or is not a defendant. Such a view might prompt this Court to grant certiorari because of a concern with the fragmentation of federal labor law expressed by Justice White, dissenting, in International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 709 et seq. (1966).

III. CONCLUSION

For the foregoing reasons, the writ of certiorari petitioned for should be granted.

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